

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DANIEL TAYLOR II,

Defendant-Appellant.

UNPUBLISHED

October 19, 2010

No. 291949

St. Joseph Circuit Court

LC No. 2008-015318-FH

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and felony firearm, MCL 750.227b. Defendant was sentenced to concurrent terms of 366 days to 5 years' imprisonment on the felon in possession conviction, and 366 days to 4 years' imprisonment on the felonious assault conviction, to be served consecutive to a term of 2 years' imprisonment on the felony firearm conviction. Because there was no error in the admission of "other acts" testimony and defendant was not denied his due process rights, we affirm.

Defendant was charged as set forth above in connection with an altercation that occurred between him and his live-in girlfriend, Trisha, on August 8, 2008. On that date, the two were in the process of moving out of the home they shared when they began arguing. Defendant's cousin, Josh, was also present at the home. The argument escalated to the point where defendant allegedly hit Trisha. The two were still arguing inside the home when, according to Trisha, defendant pointed a gun at her and told her he was going to kill her. Defendant's sister arrived after the couple moved their argument outside and testified that she heard defendant, once again, threaten to kill Trisha, though defendant did not have a weapon in his hands at the time this second threat was allegedly made. Josh testified that he was present during the entire incident and that there was no weapon involved at any time, nor did he hear defendant threaten to kill Trisha. As previously indicated, defendant was convicted of felon in possession of a firearm, felonious assault, and felony firearm.

On appeal, defendant first contends that the trial court abused its discretion in allowing testimony to be presented concerning other uncharged acts of assaults on Trisha, by defendant. We disagree.

We review the trial court's decision to admit the challenged evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Any preliminary questions of law related to the admission of the evidence are reviewed de novo. *Id.* Where, however, as here, defendant failed to preserve the issue for appeal by raising it in the trial court, our review is for plain error affecting defendant's substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001).

MRE 404(b)(1) sets forth the standards for the admission of other acts evidence and provides as follows:

Evidence of other crimes, wrong, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For evidence of other crimes, wrongs, or acts to be admissible under MRE 404(b)(1), the proponent of the evidence must show: (1) that the other acts evidence is offered for a proper purpose (other than to show character or propensity), (2) that the evidence is relevant to an issue of fact that is of consequence at trial, and (3) that, under MRE 403, the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

Notwithstanding the admission standards set forth in 404(b)(1), however, in cases of domestic violence, MCL 768.27b permits evidence of prior domestic violence in order to show a defendant's character or propensity to commit the same act. *People v Schultz*, 278 Mich App 776, 779; 754 NW2d 925 (2008). MCL 768.27b provides:

(1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

The statute defines "offense involving domestic violence" as:

an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

- (i) Causing or attempting to cause physical or mental harm to a family or household member.
- (ii) Placing a family or household member in fear of physical or mental harm.
- (iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

MCL 768.27b(5)(a).

By virtue of the above, the Legislature now allows trial courts to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

Here, defendant was accused of felonious assault. Specifically, defendant was accused of pointing a gun at his live-in girlfriend and threatening to kill her. At trial, Trisha testified that defendant had been hurting her for the past one and one-half to two years. Trisha's father testified that he had seen bruises on his daughter and that this was not the first time defendant had assaulted Trisha. This conduct easily falls within the definition of domestic violence, given that defendant's girlfriend meets the definition of a "family or household member" (see MCL 768.27b(5)(b)) and defendant's actions would cause a reasonable person to feel threatened and in fear of physical harm. The evidence would also be highly relevant to defendant's tendency to assault Trisha in the instant matter.

The disputed testimony is still, however, subject to MRE 403, and may be precluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury. . . MRE 403; *People v Pattison*, 276 Mich App at 621. Evidence is unfairly prejudicial when there is a tendency that the jury will give it undue or preemptive weight, or when allowing use of the evidence would be inequitable. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).

Here, both Trisha and her father's testimony were brief and provided no graphic details concerning any prior domestic violence. Instead, the testimony simply indicated that prior assaults had occurred and left bruises, with no specific details given. True, this evidence was prejudicial (as is most evidence presented against a criminal defendant), but, due to its lack of specificity, there was no tendency that the jury would give such evidence undue weight. This is particularly so given defendant's testimony that he was a hothead, and defendant's admission that he slapped Trisha during the incident at issue. The admission of the challenged evidence was, therefore, proper under MCL 768.27b.¹

¹ Defendant also briefly contends that the prosecutor's comments concerning defendant's status as a prior felon served as an insinuation about his bad character. However, given that defendant was charged with being a felon in possession of a firearm, the jury was already aware that defendant was a convicted felon. And, the prosecution did not needlessly dwell on defendant's status as a felon, nor did he comment on the nature of defendant's prior conviction. Any reference then, did not constitute plain error affecting defendant's substantial rights. *People v Sabin (After Remand)*, 463 Mich at 55-56.

It is uncontested that the prosecutor did not provide notice of his intent to introduce the challenged evidence, as required by MCL 768.27b(2). While the error in failing to give notice may be plain, it is not the type of error requiring reversal. The evidence at issue was relevant and not substantially more prejudicial than probative. Further, there has been no argument concerning what other evidence defendant would have presented had he been put on notice of the testimony. Moreover, according to *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), reversal is only warranted if the defendant “is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” We do not find any of the above in this case. And, considering that Trisha’s direct testimony that defendant pointed a gun at her and threatened to kill her, if believed, was sufficient to establish felonious assault, it is likely that any error in the admission of the testimony would have had no bearing on the outcome of the trial.

Defendant next finds fault with the trial court’s failure to provide the jury with a cautionary instruction regarding the “other bad acts” evidence. However, the evidence was admissible under MCL 768.27b. Thus, any cases relied upon by defendant for the proposition that a cautionary instruction may be necessary following the admission of other bad acts evidence pursuant to MRE 404(b) are inapplicable. Moreover, MCL 768.27b specifically provides that evidence such as that challenged here is admissible “for any purpose for which it is relevant,” subject only to MRE 403. The failure of the trial court to sua sponte give an instruction regarding the use of the challenged evidence does not constitute plain error warranting relief. In addition, in light of our conclusion that the challenged evidence was admissible, defendant’s ineffective assistance of counsel claim premised on his counsel’s failure to object to the admission of the testimony and failure to request a cautionary instruction is also without merit. Counsel is not required to advocate a meritless position. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant next contends that the trial court violated his due process rights by requiring a defense witness to appear in shackles at trial. We disagree.

This Court reviews a decision to handcuff or shackle a witness for an abuse of discretion. *People v Banks*, 249 Mich App 247, 257; 642 NW2d 351 (2002). Because defendant did not preserve this issue for review, however, we review this matter to determine whether a plain error occurred that affected defendant’s substantial rights. *Carines*, 460 Mich at 774.

In *Banks*, this Court was called upon, for the first time, to address the constitutional implications of a testifying witness appearing in court in shackles. Indicating that “the propriety of handcuffing or shackling a testifying witness is subject to the same analysis as that for defendants,” the *Banks* court held that “the handcuffing or shackling of a witness during trial should be permitted only to prevent the escape of the witness, to prevent the witness from injuring others in the courtroom, or to maintain an orderly trial.” *Id.* at 257.

In this matter, the only defense witness other than defendant, Josh Lung, appeared in shackles during his testimony. There is nothing in the record to indicate that the trial court considered whether Josh was an escape risk, or presented a risk of injuring others or disrupting the courtroom. The trial court simply stated to counsel (outside the presence of the jury):

And, again, Mr. Lung is in protective measures. He's a Department of Corrections inmate. He's been brought here by writ and I'm not going to interfere with the Department of Corrections security measures. You're not on trial, so it's not going to [a]ffect Mr. Taylor to have you seen in—in your protective measures, all right.

Defendant contends that because Josh was the only eyewitness to the altercation between defendant and Trisha, Josh's testimony was key to his defense. According to defendant, Josh's appearance in shackles likely made him a less credible witness in the jury's eyes, thereby prejudicing defendant. We agree that the trial court erred in permitting the witness to be shackled during his testimony without making a determination as to whether the shackles were necessary "to prevent the escape of the witness, to prevent the witness from injuring others in the courtroom, or to maintain an orderly trial." *Banks* 249 Mich App at 257. That being said, we must next determine whether the erroneous shackling of Josh requires reversal.

In *Banks*, 249 Mich App at 258, this Court also considered what standard to apply when making the above determination, concluding that the standard depended on whether the error was considered constitutional or nonconstitutional. Finding the error to be nonconstitutional in nature, the Court stated:

. . . we do not believe that the handcuffing or shackling of a defense witness [] adversely and unfairly affects a criminal defendant's presumption of innocence, thereby undermining the fairness and impartiality of the trial. While handcuffs on a testifying witness other than a defendant sends the message to the jury that the court considers the witness to be untrustworthy and even dangerous, it does not send a concurrent suggestion that the defendant is a person predisposed to commit crimes or that the defendant is a dangerous person who cannot be trusted. *Id.* at 259.

An unpreserved nonconstitutional error is not a ground for reversal unless the error is plain and has affected the defendant's substantial rights. Moreover, reversal is only appropriate where the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 774.

Here, the presence of a gun placed the credibility of defendant and of his girlfriend at issue. Trisha testified that defendant hit her, pointed a gun at her, and threatened to kill her. Defendant, however, testified that while he slapped Trisha and stated that he could kill her, he at no time pointed a gun at her. In fact, defendant testified that the referenced gun was in his possession only a few days before he returned it to Connie Cranston, who had "pawned" it to him. Connie Cranston, however, testified that she sold the gun to defendant for \$100, writing out a receipt for the purchase, and that defendant never gave the gun back to her. According to both Trisha and defendant, Josh (defendant's cousin) was at the couple's home when the altercation occurred. Josh testified that defendant did not have a gun at any time during the argument. However, Josh also testified that the couple was never out of his sight and he never heard defendant threaten to kill Trisha, while defendant's sister testified that she heard defendant threaten to kill Trisha (though he was not holding a gun). Josh's testimony concerning the absence of a gun may have served to bolster defendant's account, but the jury was still confronted with two conflicting stories regarding defendant's possession of a gun during the

incident. His testimony, then, was not critical to defendant's case. The jury was free to believe Trisha's testimony, and we therefore cannot state with certainty that the defendant's substantial rights were affected by Josh's appearance in shackles. Nor can we state with certainty that the defendant is actually innocent or that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 774.

Moreover, if a curative instruction could have alleviated any prejudicial effect, there is no error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Here, the trial court advised the jury, prior to Josh's testimony:

This is Joshua Lung. And, Mr. Lung, as is obvious, is with the Department of Corrections right now on a charge that's completely unrelated to this case, and, therefore, he is in Department of Corrections uniform and protective measures. He's in shackles. That's part of their protocols.

But the reason that he is in the Department of Corrections has absolutely nothing to do with this case; something completely different.

So don't take anything from his dress or his condition in regards to Mr. Taylor's case and he's only offering testimony as to what he saw the day he was there in August of 2008.

The trial court clearly explained that the shackles were on Josh for no other reason than that they were a part of the Department of Corrections policy, and that the jurors were to give no weight on the fact that Josh appeared in shackles. Because "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors," *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), we find that plain error did not affect defendant's substantial rights.

Affirmed.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro